No. 86-439

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

IN RE: CENTURY BRASS PRODUCTS, INC.,

Debtor.

CENTURY BRASS PRODUCTS, INC.,

Petitioner,

—against—

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Question Presented

If an employer and a union are parties to a collective bargaining agreement that provides benefits to retired employees, and modifications in those benefits are necessary to permit the employer to reorganize under Chapter 11 of the Bankruptcy Code, is a proposal containing such modifications made to the union a proposal to the "authorized representative of employees covered by such agreement" within the meaning of 11 U.S.C. § 1113?

Parties to the Proceedings

The parties to the proceeding below were:

Plaintiff-Appellee: Century Brass Products, Inc.*

Defendants-Appellants: International Union, United Automobile, Aerospace & Agricultural Implement Workers of America (UAW) and its Local 1604.

Party-in-interest: The Century Brass Products, Inc., Official Committee of Unsecured Creditors participated below as a party-in-interest in support of Century Brass Products, Inc.

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*Century Brass Products, Inc. has no parent company, subsidiaries (except wholly owned subsidiaries) or affiliates.

TABLE OF CONTENTS

	PAGE
Question Presented	i
Parties to the Proceedings	ii
Table of Authorities	iv
Opinions Below	1
Jurisdiction	1
Statute Involved	2
Statement of the Case	2
Reasons For Granting Plenary Review	6
Introduction	6
I. The Decision Below Raises Important Issues Of Federal Law That Should Be Resolved By This Court	6
A. The Expedited Process Mandated By Section 1113 Cannot Be Achieved	6
B. The Decision Will Impact Virtually Every Contract Modification	9
C. Participation Of Third Party Representatives In Employer-Union Negotiations Reduces The Prospects Of Success	9
D. The Decision Raises A Series Of Unanswered Issues Which Must Be Resolved In Order For Financially Distressed Debtors To Survive	10
II. The Decision Of The Second Circuit Is Contrary To The Language And Legislative History Of Section 1113	12

CONCLUSION 14

TABLE OF AUTHORITIES

Cases:

Allied Chemical & Alkali Workers v. *Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971) 3, 4, 5

NLRB v. *Bildisco & Bildisco*, 465 U.S. 513 (1984) 6, 7

Federal Statutes:

11 U.S.C. § 365 6
11 U.S.C. § 1113 ..... Passim
11 U.S.C. § 1113(b)(2) 7
11 U.S.C. § 1113(d)(1) 2
11 U.S.C. § 1113(e) 7
11 U.S.C. § 1113(f) 7
29 U.S.C. §§ 151 *et seq.* 3, 4
29 U.S.C. § 186(c)(5) 13
29 U.S.C. § 1002(4) 13

Other Authorities:

13 Bankr. Pens. Rep. (BNA) 1330 14

Statement by the Hon. Peter W. Rodino, Jr., Chairman of the House Committee on the Judiciary, upon the consideration of the Conference Report on H.R. 5174, 130 Cong. Rec. H7489 (daily ed. June 29, 1984) .. 12

Statement by the Hon. Strom Thurmond, Chairman of the Senate Committee on the Judiciary, upon the consideration of the Conference Report on H.R. 5174, 130 Cong. Rec. S8887 (daily ed. June 29, 1984) .. 13

Statement by the Hon. Robert J. Dole, a ranking majority member of the Senate Committee on the Judiciary and a Senate conferee on H.R. 5174, upon consideration of the Conference Report on that bill, 130 Cong. Rec. S8889 (daily ed. June 29, 1984) 12

Statement by the Hon. Orrin G. Hatch, a ranking majority member of the Senate Committee on the Judiciary and a Senate conferee on H.R. 5174, upon consideration of the Conference Report on that bill, 130 Cong. Rec. S8891 (daily ed. June 29, 1984) 8, 12

S. 2690, 99th Cong., 2d Sess., 132 Cong. Rec. S9882 (daily ed. July 30, 1986) 13, 14

H.R. 5276, 99th Cong., 2d Sess. (1986) 14

H.R. 5283, 99th Cong., 2d Sess. (1986) 14

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

CENTURY BRASS PRODUCTS, INC.,

Petitioner,

—against—

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Century Brass Products, Inc. respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding.

Opinions Below

The opinion of the Court of Appeals for the Second Circuit, entitled *Century Brass Products, Inc.* v. *International Union, United Automobile, Aerospace & Agricultural Implement Workers of America and Its Local 1604*, (App. A, 1a-24a) is reported at 795 F.2d 265 (2d Cir. 1986). The opinion of the District Court for the District of Connecticut (App. B, 25a-34a) appears at 55 Bankr. 712 (D. Conn. 1985). The opinion of the Bankruptcy Court for the District of Connecticut (App. C, 35a-61a) is unreported.

Jurisdiction

The judgment of the Court of Appeals was entered on June 30, 1986 (App. D, 62a-63a). That Court denied a timely peti-

tion for rehearing on August 13, 1986 (App. E, 64a-65a), and this petition for certiorari was filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Statute Involved

11 U.S.C. § 1113 is reprinted in Appendix F.

Statement of the Case

After a series of losses and projections for continued losses, Century Brass Products, Inc. ("Century") filed a petition for reorganization under Chapter 11 of the United States Bankruptcy Code on March 15, 1985. Modifications to the collective bargaining agreement were necessary to permit reorganization to proceed. (App. C at 52a). As a result, Century and the Union engaged in a series of bargaining sessions during April and May. Since the number of retirees covered by the labor contract is more than twice the number of active employees, it was necessary that Century's proposals include modifications affecting both groups. (App. C at 55a). A failure to adjust retiree benefits would have placed an inequitable burden on active employees and likely have led to a failure of the reorganization. (App. A at 20a). Therefore, Century proposed adjustments in both active and retired employees' benefits. (App. C at 43a-46a). However, the Union refused to negotiate because of the proposed changes in retirees' insurance.

Century then filed an application to reject the collective bargaining agreement under 11 U.S.C. § 1113. The Bankruptcy Court opened the hearing within the fourteen day time limit required by 11 U.S.C. § 1113(d)(1). Before approving Century's application the Bankruptcy Court was required to find that:

1. Century made a proposal to modify the collective bar-

gaining agreement to the authorized representative of its employees;

2. the proposal was based on the most complete and reliable information available at the time of the proposal;

3. the proposed modifications were necessary to permit Century's reorganization;

4. the proposed modifications treated all creditors, the debtor and all of the affected parties fairly and equitably;

5. Century provided the Union such relevant information as was necessary to evaluate the proposal;

6. between the time of the making of the proposal and the time of the hearing on rejection of the existing collective bargaining agreement, Century met at reasonable times with the Union;

7. at the meetings Century conferred in good faith in attempting to reach mutually satisfactory modifications of the collective bargaining agreement;

8. the Union refused to accept the proposal without good cause; and,

9. the balance of the equities clearly favored rejection of the collective bargaining agreement.

(App. C at 47a-61a).

The Union opposed Century's application, arguing primarily that: (i) although Century and the Union were the only parties to the contract, the Union was not the retirees' "authorized representative" within the meaning of 11 U.S.C. § 1113, and (ii) by attempting to negotiate over retirees' benefits Century had not bargained in good faith thereby giving the Union good cause to reject the proposals. As support for its position, the Union relied on *Allied Chemical & Alkali Workers* v. *Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971), where this Court held that under the National Labor Relations Act, 29 U.S.C. §§ 151

et seq. ("NLRA"), retirees' benefits are not mandatory subjects of bargaining because they do not "vitally affect" active workers.

In granting Century's application, the Bankruptcy Court found that Century had satisfied all statutory criteria. Specifically, it found that Century's proposal treated all parties fairly and equitably and that Century would liquidate if relief were not granted. (App. C at 60a-61a). With respect to the Union's *Pittsburgh Plate Glass* argument, the Bankruptcy Court stated:

> If a union seeks to negotiate benefits for its retirees and bankruptcy ensues, the union cannot call up the [*Pittsburgh Plate Glass*] doctrine, deny any responsibility for representation of the retirees, and, thereby, entirely frustrate §1113.
>
> * * *
>
> . . . The union, having voluntarily negotiated benefits for its retired members, has the accompanying responsibility, at least inititally, to act in the bankruptcy context as the retirees' representative under § 1113.

(App. C, at 58a-59a).

Relying on *Pittsburgh Plate Glass*, the Union presented the same arguments on appeal to the District Court. The District Court first rejected the argument that Century's insistence on negotiating retirees' benefits provided the Union with good cause to reject Century's proposals. It stated that even if *Pittsburgh Plate Glass* applied in Section 1113 proceedings, the retirees' benefits vitally affected active employees and were a mandatory subject of bargaining. (App. B at 27a-29a). With respect to the argument that the Union was not the authorized representative of retirees, the District Court stated:

> The union necessarily becomes the "authorized representative" of its retirees when it negotiates with the employer on their behalf and cannot later renounce that role when the employer seeks to modify the product of their negotiations under Section 1113.

> The court recognizes the difficulties that its holding may present for unions that wish to avoid conflicts of interest in their representation of their different constituencies. However, unions already must attempt to reconcile the conflicting interests of current and retired employees whenever they engage in collective bargaining on behalf of both groups outside the bankruptcy context. It is perhaps understandable that unions find such compromises less distasteful when they are dividing up gains rather than losses.

(App. B at 30a).

On further appeal by the Union, the Court of Appeals for the Second Circuit agreed with the Bankruptcy and District Courts that *Pittsburgh Plate Glass* did not control this case. It held that the union which negotiates and signs a collective bargaining agreement providing retirees' benefits is generally the retirees' authorized representative under Section 1113. However, departing "from a literal reading of § 1113," the Second Circuit went on to hold that a "conflict of interest" may prevent a union from serving as the retirees' authorized representative. The court stated that if "the suitability of representation on account of a conflict of interest is raised the bankruptcy court should make a determination as to whether a conflict actually exists. If a conflict is found, a representative for the class of retirees should be appointed by the bankruptcy judge." (App. A at 22a). The court then went even further and held that because Century's active employees had an interest in reducing the cost of benefits associated with retirees while Century's retirees had an interest in reducing their benefits as little as possible, a conflict of interest existed between the two groups as a matter of law. This conflict prevented the Union from serving as the retirees' authorized representative. (App. A at 23a). The court concluded that since Century had made its proposals to the Union and not to a representative of the retirees receiving benefits under Century's collective bargaining agree-

ment, it had not satisfied the procedural requirements of Section 1113.

Reasons For Granting Plenary Review

Introduction

Section 1113 represents a careful Congressional resolution of the conflict that previously existed between federal labor law, which encourages collective bargaining, and bankruptcy law, which seeks to take necessary steps to prevent liquidations and their resulting economic dislocation. Balancing the interests of both laws, Section 1113 requires a debtor to engage in an expedited form of collective bargaining with the union before modifying its labor agreement. If the bargaining does not succeed, the bankruptcy court *must* hear and decide an application to reject within brief, mandatory time limits. In a decision that affects virtually every proceeding under Section 1113, the Second Circuit interpreted the statute in a manner that completely undermines Congress's goals. The decision merits this Court's attention.

I.

The Decision Below Raises Important Issues Of Federal Law That Should Be Resolved By This Court.

A. The Expedited Process Mandated By Section 1113 Cannot Be Achieved

In *NLRB* v. *Bildisco & Bildisco*, 465 U.S. 513 (1984), this Court addressed the conflict that arises between the principles of the National Labor Relations Act and the Bankruptcy Code when an employer is forced to file a Chapter 11 petition. In a unanimous decision, the Court held that collective bargaining agreements were subject to rejection under Section 365 of the Bankruptcy Code, 11 U.S.C. § 365, provided: (1) the

collective bargaining agreement was burdensome on the estate; (2) the equities balanced in favor of rejection; (3) reasonable efforts at a negotiated settlement were made and were not likely to produce a prompt, satisfactory solution; and, (4) the policy of permitting successful reorganizations would be furthered by allowing rejection. 465 U.S. at 526-27. In a 5-4 decision, the Court went on to hold that unilateral changes by an employer prior to court authorized rejection did not violate the NLRA. *Id.* at 527-34.

Demonstrating the extreme importance of the issues presented in *Bildisco*, Congress responded to the decision approximately four months later by enacting Section 1113. Section 1113 comprehensively addresses the issues surrounding rejection of collective bargaining agreements. As the Second Circuit recognized, Section 1113 only slightly modifies the first part of the *Bildisco* decision. However, Section 1113(f), which provides that nothing in Section 1113 should "be construed to permit a trustee to unilaterally terminate or alter any provisions of a collective bargaining agreement prior to compliance with the provisions of this section," reverses the second part of the *Bildisco* holding. The impact of this provision is softened by the accelerated bargaining and court proceedings mandated by Section 1113 and by Section 1113(e), which allows a bankruptcy court to authorize interim changes in a collective bargaining agreement prior to compliance with all of Section 1113's requirements.

The structure of Section 1113 demonstrates a compromise between the policies of labor law and bankruptcy law. The process created calls for an *expedited* form of collective bargaining followed, if need be, by an *expedited* court hearing on rejection. Two factors serve to demonstrate the emphasis on speed in negotiations. First, since the debtor need only negotiate between the time it makes its proposal and the date of the hearing on rejection, the entire bargaining process envisioned by Section 1113 may occur in as little as fourteen days. *See* 11 U.S.C. § 1113(b)(2). Second, unlike traditional bargaining

where a company presents an initial offer that leaves room for give and take, the debtor's proposal under Section 1113 must cut right to the heart of the matter and be limited to "necessary" modifications. Indeed, if the debtor makes a proposal that leaves room for substantial negotiation it runs the risk that its application will be denied because all of the proposed modifications were not necessary. The time frames set forth in the statute also demonstrate emphasis on speed in the bankruptcy court should negotiations fail. The bankruptcy court must normally begin the hearing within fourteen days of the filing of the application and must rule on the application within thirty days of the start of the hearing. If the bankruptcy court has not ruled within thirty days, the debtor may make unilateral changes. Congress contemplated that the entire process, from initial proposal to court decision, could take place in less than two months. This emphasis on speed serves to "prevent delays from jeopardizing the reorganization effort or damaging the estate." Statement of Senator Hatch, 130 Cong. Rec. S8891 (daily ed. June 19, 1984), *reprinted in* 1984 U.S. Code Cong. & Ad. News 590, 594.

The decision of the Second Circuit has a profound impact on this process. The decision effectively replaces the procedures envisioned by Congress, which focused on expedited private negotiations, with one that is long on delays and court hearings and short on prospects for successful negotiation.

If allowed to stand, the Second Circuit decision requires a debtor to go into bankruptcy court early and often. First there must be a hearing to determine if a debtor's proposal raises a "conflict of interest" for the Union. If a conflict exists, which is virtually assured, the court must then determine, presumably after another hearing, who shall be appointed the retirees' representative. Only after this process is complete can the debtor finally make its proposal and actual bargaining commence. Such a result clearly undermines the Congressional goal to create a process that maximizes speed and minimizes court involvement.

B. The Decision Will Impact Virtually Every Contract Modification

The decision below is not one of limited application. Virtually all collective bargaining agreements provide some type of benefits to retirees. The Bankruptcy Code does not afford these benefits any special status. In order to comply with Section 1113's mandate that its proposal treat *all* affected parties fairly and equitably, a debtor must propose that retirees participate in any concessions. Such a proposal must be made to the authorized representative of retirees. The Second Circuit held that "generally" this will be the union which has negotiated these benefits. Logically, however, the union will never be capable of serving as the authorized representative because under the Second Circuit's analysis there will always be a conflict of interest between retirees and actives (actives desiring to maximize reduction in retirees' benefits, retirees desiring to minimize reductions). The exception swallows the rule and the net result is the time-consuming process of appointing a separate authorized representative for retirees will be required in almost every case.

C. Participation Of Third Party Representatives In Employer-Union Negotiations Reduces The Prospects Of Success

The expedited procedure established by Section 1113 is workable because the parties to the contract are familiar with contractual terms and have established procedures for dealing with each other. The necessity of a separate authorized representative diminishes the prospects for successful negotiation, a primary Congressional goal. A retirees' authorized representative will be a third party to negotiations; a party that has not been involved in the ongoing collective bargaining relationship. The intrusion of this party into what are already extremely delicate negotiations can only serve to complicate matters. Rather than narrow issues, the Section 1113 process will multiply them. Such a result necessarily defeats congressional intent by making agreement less likely.

D. The Decision Raises A Series Of Unanswered Issues Which Must Be Resolved In Order For Financially Distressed Debtors To Survive

The Second Circuit's decision raises a host of issues which can only be resolved through costly and time-consuming litigation. Given the inevitability of such litigation and the uncertainty of its result, the prospects of convincing creditors to attempt reorganization rather than liquidation and of obtaining interim financing is diminished. For Century and other companies attempting to reorganize, failure to resolve these issues will be akin to economic capital punishment.

A number of these issues are readily apparent. For example, it is unclear from the opinion whether the company must present one proposal which contains all the modifications in the collective bargaining agreement or separate proposals to each authorized representative containing only those modifications that relate to that representative's constituents. It is unclear whether the retirees' representative serves the function of a negotiator or that of a guardian ad litem. If he is simply a negotiator, then any agreement he reaches must be ratified by the retirees. The opinion does not state whether all retirees must ratify this proposal or whether a majority will suffice. If the authorized representative is a traditional guardian ad litem rather than a negotiator, it is unclear when and how he must get court approval for his actions. It is also uncertain whether any court hearing on his actions will be in effect a mini-Section 1113 hearing. Finally, it is unclear whether the authorized representative will have the authority to bind all retirees or whether individual retirees will have the right to opt out of his representation and pursue individual claims against the debtor.

The decision also raises numerous questions concerning the interaction of the debtor, the two authorized representatives and Section 1113. For example, does the union, as the signatory to the collective bargaining agreement, have the power to

reject whatever agreement is reached between the retirees and the debtor by refusing to ratify the contract? What will happen if the debtor and the union reach an agreement concerning active employees, but the debtor and retirees' representative are unable to reach an agreement concerning retiree benefits? May the debtor then seek rejection under Section 1113 and, if so, is the entire contract subject to rejection? A similar issue is raised if the debtor is unable to reach an agreement with either representative and the bankruptcy court subsequently finds that one representative properly rejected the proposal and the other representative did not. In such a situation, is all, part or none of the collective bargaining agreement subject to rejection?

The Court also failed to address the role of this representative after the initial Section 1113 process has been completed. For example, if a debtor, the union and the retirees' representative are able to reach an agreement on concessions and the debtor subsequently performs profitably, does the union's "conflict of interest" prevent it from negotiating for the return of the retirees' benefits or must the independent representative also be involved in these negotiations? If the retirees' representative must be involved in these negotiations, at what point are his services no longer necessary? Finally, does the estate have to bear the additional financial burden of the representative's expenses?

Every debtor, creditors' committee or provider of financing contemplating a reorganization in which a Section 1113 proceeding is possible will confront these issues. The uncertainty that now exists can only serve to discourage attempts at reorganization. Only by the Court's prompt review of this matter can this frustration of Congressional intent be avoided.

In sum, the Second Circuit's decision turns Section 1113 on its head. The expedited process that Congress envisioned when it enacted this important legislation has been replaced by a procedural quagmire. Moreover, the decision raises such

uncertainty about the Section 1113 process that many companies will be forced to liquidate rather than reorganize. The important issues raised by the decision merit review.

II.

The Decision Of The Second Circuit Is Contrary To The Language And Legislative History Of Section 1113.

Neither the statute nor its legislative history supports the rule created by the Second Circuit. Section 1113 simply requires that a proposal be made to the employees' "authorized representative." Nowhere does it refer even to the possibility of more than one authorized representative. In fact, the Second Circuit conceded that its interpretation departed from a literal reading of the statute. (App. A at 22a). The legislative history, likewise, contains nothing to indicate that the proposal for modifications in the collective bargaining agreement should go to any entity other than the union which is the signatory to the contract. In fact, the legislative history indicates that the proposal only goes to the union. For example, Congressman Rodino stated that the negotiations "will take place between the employer and union," 130 Cong. Rec. H7489 (daily ed. June 29, 1984), *reprinted in* 1984 U.S. Code Cong. & Ad. News 576, 577; Senator Dole stated that the debtor must make a proposal "to the union representatives" and that the debtor must provide relevant information "to the unions," 130 Cong. Rec. S8889 (daily ed. June 29, 1984), *reprinted in* 1984 U.S. Code Cong. & Ad. News 586, 588; Senator Hatch stated that the "business must make an offer to its employees' union representatives," that the "employees' Union representative" must be given an opportunity to review and accept or reject a proposal, and that "the unions must not reject the business offer without good cause," 130 Cong. Rec. S8891 (daily ed. June 29, 1984), *reprinted in* 1984 U.S. Code Cong. & Ad. News

590, 592, 593; and Senator Thurmond stated that the debtor must make a proposal "to the union" and that the "union" must not refuse to accept the proposal without good cause, 130 Cong. Rec. S8887 (daily ed. June 29, 1984), *reprinted in* 1984 U.S. Code Cong. & Ad. News 581, 583. In essence, the legislative history demonstrates that Congress used the terms "authorized representative" and "union" interchangeably.

The interchange of the words "authorized representative" and "union" cannot be brushed aside as congressional ignorance. Congress is certainly aware that virtually all collective bargaining agreements include retirements benefits. In fact, Section 302(c)(5) of the Taft-Hartley Act, 29 U.S.C. § 186 (c)(5), which authorizes collectively bargained retirement plans, requires such plans be administered by a joint *union*-employer board, not a tripartite union-employer-retiree board. Similarly ERISA, the primary federal statute involving retiree benefits, repeatedly refers to "labor unions." *See, e.g.*, 29 U.S.C. § 1002(4). Congress cannot be presumed to be ignorant of the entire federal statutory scheme when it set up Section 1113. Therefore, if it had intended to create a new rule of law whereby the debtor had an obligation to determine whether a conflict of interest existed between a union and retirees and then go to the bankruptcy court to seek appointment of an independent representative for the retirees for purposes of collective bargaining, some indication of this intent should have appeared in the language of the statute or its legislative history.

Congressional awareness of the impact of bankruptcy proceedings on collectively bargained for retirees' benefits is further demonstrated by the recent events surrounding LTV Corporation, which filed a Chapter 11 petition on July 17, 1986. Unlike Century, LTV discontinued retirees' insurance benefits prior to compliance with Section 1113. The Senate responded to this action by passing S. 2690, which specifically requires LTV to continue providing these benefits until it receives a court order to the contrary. S. 2690, 99th Cong., 2d Sess., 132

Cong. Rec. S9882 (daily ed. July 30, 1986).[1] Similar provisions were introduced to the House. H.R. 5276, 99th Cong., 2d Sess. (1986); H.R. 5283, 99th Cong., 2d Sess. (1986). This swift Congressional response demonstrates the extreme national importance of the issues raised here. A decision by this Court would clarify both the status of and proper method for handling retiree claims under Section 1113.

CONCLUSION

For all the foregoing reasons, Petitioner suggests that the important questions presented by this case warrant this Court's consideration. Therefore, Petitioner requests that this petition for certiorari be granted.

Respectfully submitted,

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[1]Senate bill S. 2690 is applicable only to LTV. On the same day the Senate bill passed, LTV procured a court order authorizing the continuation of retirees' insurance payments, LTV took this action because of labor unrest among active employees. *See* 13 Bankr. Pens. Rep. (BNA) 1330.